

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

77-2079

In The
United States Court of Appeals
For The Second Circuit

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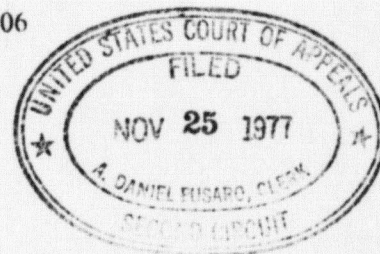
UNITED STATES OF AMERICA,

VS.

ANTHONY DELUTRO,
Defendant-Appellant.

**REPLY BRIEF FOR
DEFENDANT-APPELLANT**

H. ELLIOT WALES
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(212) 682-6806



UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Docket No. 77-2079

- v -

ANTHONY DeLUTRO,

Appellate-Defendant.

APPELLANT DeLUTRO'S REPLY BRIEF

This Memorandum of Law is submitted by the appellant Anthony DeLutro in reply to the answering Brief of the Government.

Most of the arguments now advanced by the Government in this Court were not raised in the District Court, nor were they considered by the District Court in its summary opinion (Appendix page A1). If the Government wishes to argue that the defendant has not shown any prejudice, it should do so in the first instance in the District Court, with an opportunity to the defendant to answer the Government contentions, and to advance its own claim of prejudice.

Nor was it appropriate for the Government to raise reference to several other court proceedings and trials involving the defendant in past years, when in fact these references were not raised in the District Court, or considered by the District Court in its succinct opinion.

The Government's position is based on its reading of the law and of the cases that a number of factors should be considered by the Federal Court in evaluating the merits of a Section 2255 petition. We agree with that position, and the reading of the law. We do submit that initially the District Court should confront these mixed issues of fact and law, and that the role of the Court of Appeals should be limited to reviewing an adequate record which has dealt with these issues.

The Government argument that the 1955 requirements of Rule 11 were in fact met is a mixed question of law and fact which was not found nor considered by the District Court in its memorandum opinion. Again that issue should be initially considered by the District Court.

Nor is there any real merit to the Government argument (page 16) that because a retrial may well be impossible, a granting of the petition "may allow an obviously guilty defendant to go free" (556 Fed. 2d at 109). Inasmuch as the defendant has long since served the sentence, he could not receive additional time upon a resentencing. As the defendant just completed the second year of a 25 year sentence, his prospects "to go free" are really quite dim.

I submit that a remand to the District Court for an evidentiary hearing is in order so that both the Government and defense can initially present to the District Court many arguments and contentions of fact and of law that each wishes to present and to argue.

Dated: New York, New York
November , 1977

Respectfully submitted,

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COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

- against -

ANTHONY DE LETRO

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, Reuben A. Shearer, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street, New York, New York 10030.

That on the 25th day of November 19 77 at 1 St Andrews Plaza
New York, New York

deponent served the annexed
Reply Brief

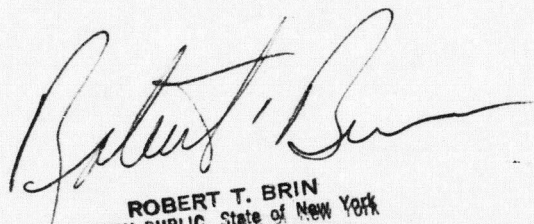
upon
U.S. Attorney Southern District
Robert B Fiske, Jr.

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 25th
day of November, 19 77



Reuben A. Shearer



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1978